

LOCK THE GATE ALLIANCE

AUSTRALIANS WORKING TOGETHER TO PROTECT OUR LAND, WATER, AND FUTURE 

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Dear Samantha

We write concerning the expired gateway certificate for the Bylong coal project and the actions required for determination of the application. Thank you for the opportunity to submit our comments on this matter.

Our view of the operation of section 50A of the *Environmental Planning and Assessment Regulation 2000* in conjunction with section 17B of the *State Environmental Planning Policy (Mining, Petroleum and Extractive Industries) 2007* accords with the preliminary view already expressed by the Commission. That is, for the Bylong coal project to be lawfully determined, the application must be accompanied by a current gateway certificate. In our view, this leaves the Commission unable to grant consent to the project as the development application is not compliant with section 50A of the *EP&A Regulation 2000*.

We note that the advice from counsel supplied by the proponent pre-dates the IPC's letter to KEPCO by over six weeks and is dated seven weeks after the previous gateway certificate expired. This calls into question the good faith of the proponent's argument that the issue should have been raised sooner. Since the advice obtained by KEPCO on 3 June indicates that the question as to whether it needs a current gateway certificate for determination to lawfully be made, is open, it should have been KEPCO itself that raised the issue sooner.

Furthermore, the blame which KEPCO appears to apportion to the IPC in relation to the lapsing of the certificate is, in our view, severely misplaced and inappropriate. It is squarely the responsibility of the proponent to ensure that they are compliant with the NSW planning and environment laws, and to ensure the currency of relevant approvals, not the IPC.

Currency matters for the life of a development application

There is nothing in section 50A of the *EP&A Regulation* that specifies that the currency requirement of the certificate was relevant only at the moment a development application is made and we argue that it imposes a continuing obligation for the reasons outlined below. While we concede the word "current" does not appear in section 17B of the Mining SEPP it is sufficient that the recommendations of the certificate must be considered, given that the certificate itself includes the statement, "This certificate will remain current for 5 years from the date of issue."

A “development application” is a thing that exists in time from the moment of its creation or lodgement to the moment of its determination, when consent is either granted or refused. While we agree with the proponent that one purpose of a gateway certificate is to inform the Secretary in the preparation of environmental assessment requirements, that is not its sole purpose, as section 17B of the Mining SEPP makes clear. For example, 17B (2) stipulates: *“In determining an application for development consent for mining or petroleum development that is accompanied by a gateway certificate, the consent authority must consider whether any recommendations set out in the certificate have or have not been addressed and, if addressed, the manner in which those recommendations have been addressed.”*

The recommendations of gateway certificates and the advice received in the granting of that certificate are matters for consideration *in the determination* of mines that affect strategic agricultural land. Therefore, the currency of the certificate and its accompanying recommendations are a matter that is relevant both at the beginning and the end of the life of a development application.

We note that the five year standard length of time of gateway certificate currency as set by section 17K of the Mining SEPP (which has five years as the maximum duration), weighs against the proponent’s interpretation that currency is not relevant at determination. Were the need for currency solely a consideration at the time a development application is created, we argue that the standard period of time would be much shorter. Five years is more than the normal amount of time it takes for a development application to be determined, as the proponent has observed, and so it is reasonable to see that the currency of a gateway certificate is intended to coincide with the entire period of a development application.

The purpose of the currency provision

The proponent is silent on the purpose of the currency provision, and does not appear to consider why the five year term of currency would have been created in the first instance. We argue that this is very important consideration for the IPC. The purpose of the gateway certificate is to consider the impact of a mine proposal on the eleven relevant criteria set out in section 17H of the Mining SEPP. These criteria speak to the agricultural context of the development, its impacts on physical attributes like soils and highly productive groundwater, but also its impacts on infrastructure, land use, continuity, access to infrastructure and subject considerations like scenic and landscape values. Such impacts are dynamic and temporal in their nature. The inclusion of a five year term of currency for gateway certificates recognises that the significance of these contexts and the impacts of a mine on them, may change over time, as may the development proposal itself.

We also believe that the aims of the Mining SEPP are relevant to the interpretation of the currency issue. Section 2d) includes as the fourth aim of the Mining SEPP:

- (d) to establish a gateway assessment process for certain mining and petroleum (oil and gas) development:*
- (i) to recognise the importance of agricultural resources, and*
- (ii) to ensure protection of strategic agricultural land and water resources, and*
- (iii) to ensure a balanced use of land by potentially competing industries, and*
- (iv) to provide for the sustainable growth of mining, petroleum and agricultural industries.*

This can, we believe, be interpreted to suggest that an effective object of the Mining SEPP is to 'ensure protection of strategic agricultural land.' We contend that the currency issue must be considered in this context, which would undoubtedly warrant a new certificate to be provided in order to determine whether that object can be met.

Crucial importance of current advice and recommendations for BSAL

In relation to the specifics of the Bylong gateway certificate, and the impacts of the project on BSAL and CIC in the Bylong Valley, we find additional grounds to warrant an updated certificate to be obtained. We note that there has been substantial additional information produced during the process which is relevant to the 11 gateway criteria. In particular, we note that the recent report by GML Heritage provides new information on the impacts of the likely loss of scenic and landscape values as a result of the project, which is relevant to criteria 17H 4(b) (v).

We have consulted soil scientists and experts in this field and have found no published research showing rehabilitation of open cut coal mines to a state that meets the BSAL criteria. Experts advise us that the work of developing policy in this area was aborted. In the absence of clear frameworks and confidence, the precautionary principle should be exercised.

Of further relevance is the fact that, despite numerous opportunities to do so, the proponent has repeatedly failed since the Gateway Certificate was granted to prove that it is possible to 're-create' BSAL soils, which is relevant to criteria 17H 4a) (i) (ii) (v) and (vi). In fact, KEPCO's most recent submission to the IPC in response to the GML Heritage report, effectively provided new evidence confirming that it will *not* be able to 're-create' BSAL soils. The report includes an Appendix D, which is purportedly a presentation by Clayton Richards, which actually states that '*No rehabilitation has targeted the 12 BSAL criteria*'. It then refers to a couple of alleged rehabilitation trials, which apply to an area that is well below the BSAL cut-off of 20 hectares, but categorically fails to provide evidence from those trials that BSAL can be 're-created.'

In relation to 17H 4 (a) (iv), there has been considerably more information emerge that is relevant to impacts on highly productive groundwater. In its review, the Commission itself noted that KEPCO had acknowledged there may be conditions where the proposed bore field would be unable to provide 'make-up water.' In addition, since the Gateway Certificate was granted, a number of surrounding landholders have written to the IPC indicating that the compensatory water agreements proposed by KEPCO are unsatisfactory. Furthermore, and most notably, KEPCO have also been forced to acknowledge that they will drawdown groundwater beyond the minimal impact thresholds set in the Aquifer Interference Policy 35 registered bores within the Bylong alluvium on KEPCO's land. Finally, there have been concerns raised that the proponent will not be able to obtain adequate shares in the Permian water resource, which have not been properly addressed.

In short, the weight of new information relevant to the specific criteria in the context of the aims of the Mining SEPP and the specific duration limits contained within it, provide very strong grounds for the argument that KEPCO should be required to provide a current gateway certificate before the IPC can legally determine the project.